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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1510

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Petitioner,*

v.

WILLIAM R. BURKETT, JEFF R. LAIRD, JAMES M. PETERS, FLOY E. DAWSON, O. B. JOHNSTON III, and G. PHIL HARNEY, and WILLIAM R. BURKETT as United States Attorney for the Western District of Oklahoma, and CLYDE L. BICKERSTAFF, as Oklahoma District Director of Internal Revenue Service and DAVID HALL and JO EVANS HALL, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Court Rule Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Appendix A—Opinion and Denial of Rehearing	1a
Appendix B—Local Rule 4(j) Western District of Oklahoma	23a
Appendix C—The Contempt Order	25a

TABLE OF AUTHORITIES

Chandler v. *Judicial Council,* 398 U.S. 74, 26 L.Ed.2d 100, 90 S. Ct. 1648	9
Ex parte Robinson, 86 U.S. (19 Wall) 505	11
In re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117, 88 S. Ct. 1222	11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Stephen S. Chandler, Judge of the United States District Court for the Western District of Oklahoma, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on November 7, 1974. A petition for rehearing en banc

by the United States Court of Appeals for the Tenth Circuit was denied by that Court on January 29, 1975.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and the denial of the petition for rehearing and suggestion for rehearing en banc of that court are contained in Appendix A to this brief and said opinion is reported in 505 F.2d 217.

JURISDICTION OF THIS COURT

The statutory provision conferring jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is contained in 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

Petitioner, as a United States District Judge, in certain proceedings pending before him involving investigation by the Justice Department and the Internal Revenue Service of possible income tax evasion by then Governor Hall of Oklahoma, entered a judgment of disbarment whereby petitioner disbarred the United States Attorney for the Western District of Oklahoma, certain members of his staff and a senior attorney of the Internal Revenue Service office of Regional Counsel. Petitioner also entered an order holding same attorneys in contempt of his court for their conduct in his court. The United States Court of Appeals for the Tenth Circuit reviewed and set aside those orders of disbarment and contempt in a series of related proceedings brought to that court by various parties involved in the Oklahoma orders and which proceedings were ultimately consolidated in the United States Court

of Appeals and disposed of by the opinion by Judge Doyle of that court. That opinion and the orders therein are sought to be reviewed by the petition for writ of certiorari. The three proceedings in the United States Court of Appeals for the Tenth Circuit which were consolidated for final disposition consisted of a petition for writ of mandamus, an appeal from the judgment of disbarment and an appeal from the order of contempt.

Questions presented for review in this matter are those of the right, power and propriety of petitioner as a United States District Judge to order disbarment of attorneys appearing before him and holding them in contempt under the facts and circumstances arising in this case. A further question involves the validity, constitutionality and applicability of a local rule of the United States District Court for the Western District of Oklahoma. A further question presented for review is the right of judicial discretion of a United States District Judge in the maintenance of dignity of the court by entering orders of disbarment and contempt for acts committed before him.

RULE OF COURT INVOLVED

Local Rule 4(j)(1) of the rules of the United States District Court for the Western District of Oklahoma promulgated by that court and effective March 15, 1973 is involved in this proceeding. A copy of said rule appears in Appendix B.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court

The jurisdiction of the United States District Court for the Western District of Oklahoma in the first in-

stance arose in a petition filed before that court by Governor David Hall and his wife to perpetuate testimony of one Dorothy Pike who had previously been Governor Hall's secretary. That proceeding was commenced under Rule 27 of the Federal Rules of Civil Procedure. The proceeding to perpetuate testimony in turn related to matters cognizable in a court of the United States in that Governor Hall was under investigation by the Internal Revenue Service and Department of Justice for both civil and criminal federal income tax liabilities. The second proceeding initially brought in the United States District Court for the Western District of Oklahoma also by Governor Hall and his wife was a petition seeking to enjoin the Justice Department and Internal Revenue Service from interfering with attempts by Governor Hall to communicate with the witness, Dorothy Pike. This proceeding also invoked the jurisdiction of the United States District Court under Rule 65 of the Federal Rules of Civil Procedure seeking an order restraining and enjoining certain federal agencies from allegedly secreting a witness key to the investigation of the income tax problems of Governor Hall and his wife.

Summary of Proceedings in United States District Court

Two proceedings were commenced in the United States District Court by Governor Hall and his wife. One designated 74-29-C in that court was a petition to perpetuate the testimony of Dorothy Pike, former secretary to Governor Hall and the other proceeding, 74-30-C in that court, sought to enjoin alleged interference by the Justice Department or Internal Revenue Service of efforts of Governor Hall to communicate with and interview Dorothy Pike who

was a key witness in the admitted investigation of the Justice Department and the Internal Revenue Service into Governor Hall's income tax liabilities. In that proceeding Governor Hall alleged invasion of his civil rights. The proceedings in the United States District Court are summarized in the opinion of Judge Doyle of the United States Court of Appeals for the Tenth Circuit which opinion appears in Appendix A. Incorporated as a part of that opinion is the judgment of disbarment dated March 11, 1974 entered by petitioner. Appendix C contains the contempt order.

Essentially, the two proceedings initiated in the United States District Court before petitioner were those of Governor Hall and his wife as private citizens seeking access to the Governor's former secretary who Governor Hall felt was being hidden out by agents of the federal government to prevent communication by him or his counsel. A number of hearings were held before petitioner involving the United States Attorney for the Western District of Oklahoma, members of his staff and regional counsel of Internal Revenue Service who was assisting the United States Attorney before petitioner in these proceedings. Petitioner urged assistance and cooperation of government counsel in giving the court full information about the whereabouts of the witness, Dorothy Pike. Petitioner in these several hearings made repeated efforts to resolve the controversy about the availability of the witness Dorothy Pike and his rulings were designed to make the witness available for testimony under oath. On March 11, 1974, petitioner entered both a judgment of disbarment of the government counsel involved and an order requiring the same government counsel to show cause why they should not be punished for contempt for their

conduct in not complying with the court's orders regarding the witness, Dorothy Pike. The orders of disbarment and contempt were based upon the same conduct of government counsel in not carrying out the mandate of petitioner to bring about the final result which it was apparent petitioner was requiring—namely, production of the witness, Dorothy Pike, for examination under oath by Governor Hall.

Petitioner invoked the local rule of his district in meting out discipline to government counsel appearing before him and that rule is held by the decision of the United States Court of Appeals for the Tenth Circuit to be unconstitutional in its use by Judge Chandler.

The primary thrust of the appellate proceedings commenced in the United States Court of Appeals for the Tenth Circuit and consolidated by that court, was the two-fold contention by government counsel that the orders of Judge Chandler violated due process and were not supported by the evidence. Petitioner's position is simply that as a trial judge it is his duty to maintain the dignity of his court and the conduct of government counsel justified his actions; that his discretion as a trial judge should not be second guessed by an appellate court; that he acted under the provisions of a local rule of his court; and, finally, that there was no violation of the constitutional right of due process in his disciplinary orders.

In the proceedings before petitioner, Judge Chandler, it soon became evident that the United States Attorney for the Western District of Oklahoma was refusing to divulge the whereabouts of the witness, Dorothy Pike, when he had the means readily available to him to ascertain her whereabouts and that this was

true when he was first asked to do so on January 17, 1974 at the initial proceeding before petitioner. Petitioner has asked the clerk of the United States Court of Appeals for the Tenth Circuit to certify the record to this Court. The transcript of the proceedings which took place before petitioner, discloses petitioner's obvious concern that government counsel were not leveling with him regarding the whereabouts of the witness, Dorothy Pike, when it was most evident that petitioner had determined that this witness must be made available and that he had determined his jurisdiction to issue process and order her to testify. The first hearing was January 17, 1974 and petitioner advised of his conclusion that the witness should be made available. At the hearing on January 21, 1974 petitioner not only directed the issuance of a subpoena to require the witness to appear, he gave notice to government counsel that any attempt to prevent her appearance in his court would be "unethical" and would "constitute obstructing and impeding justice" and could subject the person preventing Mrs. Pike's appearance to be in contempt of his court. An attempt by government counsel to have the order issuing the subpoena stayed by the United States Court of Appeals for the Tenth Circuit was refused in that court. On January 22, 1974, Judge Chandler again made his views known that any party or counsel who had information as to the whereabouts of Mrs. Pike was to furnish that information at once. On January 28, 1974, Judge Chandler entered a written order ordering the parties to assist in the search for the witness. The United States Court of Appeals concluded in its opinion that "Mr. Burkett was unenthusiastic in his response to the suggestions and exhortations of Judge Chandler to cooperate" but went on to

find that there was insufficient evidence to support the holding of contempt and order of disbarment.

An important fact in the chronology of events before Judge Chandler and a fact vital to determination of the questions presented to this Court on the constitutionality of a local rule of court and the right of the trial judge to discipline attorneys, is the fact that in the judgment of disbarment government counsel were invited to file before Judge Chandler a petition for review of the judgment of disbarment. In the order for contempt government counsel were ordered to appear before the court and show cause why they should not be found in contempt. This procedure not only followed the local rule of court, but was consistent with due process and gave notice to government counsel who were being punished and gave them full allowance for protection of their right to be heard further before Judge Chandler. Government counsel refused the offered right for review and went direct to the United States Court of Appeals for relief contending that their rights were violated and they had not had their day in court on the disciplinary orders issued against them.

REASONS FOR THE PETITION

First and foremost, this proceeding involves the critical problem of maintaining the dignity of the trial court and the right and discretion of a trial judge to order discipline of attorneys appearing before him because of their conduct in dealing with the court and in not complying with the directives and requirements of the court. This case involves a need for defining the right and discretion of a trial judge for guidance for trial courts, both state and federal, in maintaining the dignity of their courts at a time when

the preservation of that dignity and maintenance of discipline therein is under pressure and attack throughout the land. No more important problem exists in the administration of justice. This case raises the question of propriety of procedures for both disbarment and holding of counsel in contempt by a United States District Judge and whether or not the procedures invoked by Judge Chandler violated the constitutional right of due process of government counsel appearing before him. This case involves whether or not disciplined counsel can by-pass review procedures at the trial court level and go to the Court of Appeals.

This Court speaking through Chief Justice Burger in a case also involving petitioner, in the case of *Chandler* v. *Judicial Council,* 398 U.S. 74, 26 L.Ed. 2d 100, 90 S.Ct. 1648, in which the actions of the Judicial Council of the Tenth Circuit regarding the assignment of cases to Judge Chandler were upheld stated:

> "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."

This Court went on to say that the housekeeping problem of assignment of cases and the dividing of court business was properly a subject for action by the Judicial Council. In the case at bar, however, we submit that Judge Chandler's invoking of his local disciplinary rule was done by him as the judge in charge of his own court and the conduct of all proceedings before him was done in carrying out the "decisional function."

United States District Courts have adopted local rules of proceedings before those courts which embrace

such things as disciplinary procedings. These rules are commonplace in districts of the federal judicial system. The Western District of Oklahoma effective March 15, 1973 adopted some thirty-two rules, one of which is Rule 4 involving attorneys and embraces all aspects of eligibility, admissability, requirement of resident counsel and discipline. Subdivision j of Rule 4 of the local rules of the Western District of Oklahoma is set forth in Appendix B. Judge Chandler proceeded under subdivision 1 of said rule entitled "summary discipline." The decision of the United States Court of Appeals for the Tenth Circuit rejected the contention of Judge Chandler that pursuant to the local rule he gave the disbarred attorneys a chance for a hearing and review before him. The Tenth Circuit stated in its opinion as follows:

> "We have considered fully the contention of Judge Chandler that in adjudging the disbarments he acted consistently with Local Rule 4(j)(1) which gave petitioners-appellants a remedy to seek a review of the disbarment judgments. To the extent that the Rule allows entry of a final judgment of disbarment without a hearing, it conflicts with the Supreme Court and other federal court decisions. On that account, we have had to reject this argument advanced by respondent. The finality of the adjudications here is unquestionable. It is equally clear that there were no hearings."

We submit that as further reason for review by this Court of the decision of the United States Court of Appeals, the application and constitutionality under the due process clause of this local rule of the Western District of Oklahoma on discipline of attorneys should be scrutinized by this Court. It will be of importance

and guidance to United States District Courts throughout the entire federal judiciary to have a pronouncement of this Court as to constitutionality and applicability of rules of discipline and the extent to which summary discipline is proper for conduct committed in the presence of the court. If certiorari is granted in this case, it is our intention to make a survey of disciplinary rules of other United States District Court to compare other local rules to that of the Western District of Oklahoma.

We further submit that the decisions of this Court cited by Judge Doyle in his opinion for the Tenth Circuit (Appendix A) in the case of *Ex parte Robinson,* 86 U.S. (19 Wall.) 505 (1874), and the case of *In re Ruffalo,* 390 U.S. 544 (1968), calling for an opportunity of a disbarred attorney to have opportunity for explanation and defense do not call for reversal of Judge Chandler's orders. Judge Chandler in his order of disbarment specifically invited filing of a petition for the order to be reviewed and for showing of cause to set it aside, which invitation was declined by the disbarred attorneys in this case. Thus the disbarment order was not a "final one" and the statement in the opinion that "the finality of the adjudication here is unquestionable" constitutes a misapprehension of the disbarment order of Judge Chandler and calls for review by this Court by the granting of certiorari.

Petitioner does not contend that government counsel should have no opportunity to defend against his action of disbarment under due process, but contends that in the very order of disbarment a time was set for filing of a petition for relief and review of his

order, indicating that the order was not a final one. Petitioner feels an opportunity under the local rule of his court was being given to these attorneys for answering the court's determination that they should be disbarred. The very fact that this controversy arose as to the application of local Rule 4 of the Western District of Oklahoma and whether or not its application by Judge Chandler in this case constitutes a violation of due process itself displays the need for pronouncement by this Court in the important area of matters of discipline by a trial judge.

A final basis for a need for review by this Court of the decision of the Tenth Circuit is the finding of that court that the remedy of mandamus was available when that court determined that the contempt order was not a final order and therefore not an appealable order. The opinion cites decisions of this Court to the effect that a writ of mandamus is not to be used as a substitute for an appeal. Nevertheless, the court goes on to find that the circumstances in this case were "exceptional and justifying entertaining the mandamus." The order of contempt was a show-cause order and contained an order that government counsel involved should show cause in writing why they should not be punished for contempt. The attorneys involved have never attempted to make a showing of cause and no punishment for contempt has been meted out by Judge Chandler. Nevertheless, the Court of Appeals utilized the extraordinary remedy of mandamus and entertained the writ of mandamus thus allowing the attorneys involved to by-pass the trial court. We sub-

mit that the need for clarification as to use of the remedy of mandamus is called for in this case.

Respectfully submitted,

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May 1975